

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION IV

IN THE MATTER OF:)	
JAMES E. YONGE/NOH, INC.)	DOCKET NO. CWA-IV 94-522
Respondent)	
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DECISION AND ORDER ON COMPLAINANT'S MOTION TO AMEND COMPLAINT

This is a proceeding for Class I administrative penalties brought by the Director of the Water Management Division of the United States Environmental Protection Agency (EPA), Region IV ("Complainant") against James E. Yonge and NOH, Inc. ("Respondents") for alleged unlawful discharge of a pollutant into the St. Johns River, in violation of Section 301(a) of the Clean Water Act (the "Act"), 33 U.S.C. § 1311(a).

The rules applicable to this proceeding are the proposed "Consolidated Rules of Practice Governing the Administrative Assessment of Class I Civil Penalties Under the Clean Water Act, 56 Fed. Reg. 29,996 (July 1, 1991) ("Non-APA Rules").

Section 28.18(b)(2) of the Non-APA Rules provides that

"The complainant may amend the administrative complaint....by stipulation with the respondent or by permission of the Presiding Officer at any time after the deadline prescribed by § 28.20(a) or (b) of this part (whichever applies), or the date of respondent's filing of a response in the action, whichever is sooner."

The initial proposed Administrative Complaint in this action was filed on September 19, 1994, seeking the assessment of a civil penalty against NOH, Inc. and James E. Yonge (Respondents) for unlawful discharge of a pollutant into navigable waters in violation of Section 301(a) of the Act, 33 U.S.C. § 1311(a) in

violation of certain terms and conditions of an NPDES permit issued by EPA pursuant to Section 402 of the Act, 33 U.S.C. § 1342. The Complaint further alleged at paragraph 4 that Respondents own a wastewater treatment facility located at The Point Townhouses, U.S. 17, Orange Park, Florida. Complainant further alleged at paragraph 7, that Respondent NOH, Inc. applied for an NPDES permit as the owner and operator of the facility and Respondent James E. Yonge owns an undivided interest in the facility as successor to the interest of PDY, Inc. The act of discharging pollutant from the facility to the St. Johns River in excess of effluent limitations contained in the permit, is attributed to both Respondents at paragraph 10 of the Complaint. Complainant now seeks to amend the Complaint for the purpose of naming Mr. Yonge as the operator of the facility, in addition to the previous allegation of liability as an owner. Complainant's motion to so amend the Complaint was filed contemporaneous with the filing of its Response to Respondent James E. Yonge's Motion to dismiss the Administrative Complaint against him or enter summary determination in his favor, on the basis that there is no genuine issue as to any material fact that he, James E. Yonge, individually owned or operated the waste water treatment facility.

Respondent strongly opposes this amendment, citing numerous cases in support of its position. Respondent argues that the

amendment would be futile because neither NOH¹ nor James Yonge actively participated in any way in the operation of the facility.

Although § 28.18 of the Non-APA Rules, provides that once a Response to an Administrative complaint is filed, a Complaint may be amended either by stipulation with the respondent or by permission of the Presiding Officer, the basis for granting such permission is not set out. However, In the Matter of Thomas Kelly and Prisk & Sons, EPA Docket No. CWA AO-028-94 [CWA § 309(g), (relied upon by the undersigned Presiding Officer In the Matter of Tri-County Water Conditioning, Inc., Docket No. CWA-IV-93-529), the Presiding Officer looked to the Federal Rules of Civil Procedure (FRCP) for guidance, and specifically relying upon FRCP 15 and 21, found that the competing interests of the "respondents' right to speedy justice and the prejudice experienced by them due to delay must be weighed against the interest of full and fair hearing". Id., p. 4. In a case cited by Respondent, Scoggins v. Moore, 579 F. Supp. 1320 (N.D. Ga. 1984), the court set out factors to be considered in deciding whether to grant leave to amend, such as "undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue

¹It should be noted that the Motion for Summary Determination was filed only on behalf of Respondent James Yonge, not NOH, Inc. Notwithstanding Respondent's request on p. 8 of its Response in Opposition to Complainant's Motion for Amendment of Complaint that "...both Respondents should be dismissed and/or summary judgment entered in their favor", liability of NOH, Inc. is not under consideration here.

prejudice to the opposing party by virtue of allowance of the amendment, ...and futility of the amendment" (citing Bamm, Inc. v. GAF Corp., 651 F.2d 389 (5th Cir. 1981)). As Respondent represents, the Motion to Amend was denied in the Scoggins case. Although the motion to amend was filed after motion for summary judgment had occurred, other procedural aspects of that case not present in this matter influenced the decision. For instance, in the one year period between filing the original complaint and seeking to amend it, not only had motions for summary judgment, reconsideration, a protective order and relief from judgment been decided, but substantial discovery had also occurred. Id., p.1322.

The prehearing exchange of information was postponed in this action based upon representation by both parties that they were engaged in productive settlement negotiations. Although the process has been somewhat protracted for that reasons, the fact that prehearing exchange of information has not occurred lends additional support for the notion that there should not be any undue prejudice to either party as a result of granting Complainant leave to amend. On the contrary, there will be undue prejudice resulting to the movant from denying leave to amend. Judicial efficiency will be best served by granting Complainant's motion.

The Respondent will have the opportunity to respond fully to an amended complaint seeking relief against him as an operator. A prehearing conference will be scheduled within 20 days of the

filing of the Response, for the purpose of setting an expeditious exchange of information. The Respondent's right to seek summary determination on the issue of Respondents' liability as owners and/or operators is preserved. Complainant's Motion to Amend the Complaint is GRANTED.

ORDER

1) Complainant's Motion to Amend the Administrative complaint is GRANTED. Complainant shall file the Amended complaint no later than October 20, 1995. The Response is then due in accordance with the time constraints set out at § 28.20 of the Non-APA Rules.

2) Complainant shall file the Administrative Record to the Amended Administrative Complaint as required by § 28.16(e) of the Non-APA Rules contemporaneous with the filing of the Amended Administrative Complaint.

Date: Oct. 12, 1995



Susan B. Schub
Presiding Officer

IN THE MATTER OF JAMES E. YONGE/NOH, INC.
DOCKET NO CWA-IV 94-522

CERTIFICATE OF SERVICE

I certify that the foregoing DECISION AND ORDER ON RESPONDENT JAMES E. YONGE'S MOTION FOR SUMMARY DETERMINATION OR IN THE ALTERNATIVE MOTION TO DISMISS, dated October 12, 1995, was sent this day in the following manner to the addressees:

Hand delivered:

Julia P. Mooney
Regional Hearing Clerk
U.S. EPA, Region IV
345 Courtland Street
Atlanta, Georgia 30365

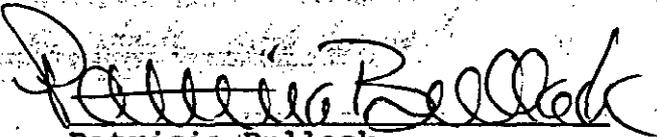
Wayne Lee, Esq.
Assistant Regional Counsel
U.S. EPA, Region IV
345 Courtland Street
Atlanta, Georgia 30365

First Class Mail:

Douglas H. Reynolds
Cox & Reynolds
4875 N. Federal Highway
Tenth Floor
Fort Lauderdale, FL 33308

Date:

10-12-95


Patricia Bullock
Legal Clerk